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May 17, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, D.C. 20554

**Re: Western Wireless Corp. Petition for Preemption of an
Order of the South Dakota Public Utilities Commission;
CC Docket No. 96-45, DA 99-1356**

Dear Ms. Salas:

I am writing to inform you that representatives of Western Wireless Corp. ("Western Wireless") made a telephonic *ex parte* presentation yesterday regarding the proceeding referred to above, to Richard Smith and Gene Fullano of the Common Carrier Bureau's Accounting Policy Division staff. Participants in the presentation included Jim Blundell of Western Wireless, and Michele Farquhar, David Sieradzki and the undersigned, counsel for Western Wireless. The presentation focused on the status of litigation in South Dakota state court between Western Wireless and the South Dakota Public Service Commission, and the North Dakota Public Service Commission's denial of eligible telecommunications carrier status to Western Wireless for the rural telecommunications company service areas in that state. In addition, the attached materials related to those issues were faxed to Mr. Smith on behalf of Western Wireless.

Respectfully submitted,



Ronnie London

Counsel for Western Wireless Corp.

Enclosures

cc: Richard Smith
Gene Fullano

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STATE OF NORTH DAKOTA**PUBLIC SERVICE COMMISSION**

**Western Wireless Corporation
Designated Eligible Carrier
Application**

Case No. PU-1564-98-428

SECOND FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

April 26, 2000

Appearances

Commissioners Bruce Hagen, Susan E. Wefald and Leo M. Reinbold.

Gene Dejordy, Executive Director of Regulatory Affairs, Western Wireless Corporation, 3650 131st Avenue SE, Suite 400, Bellevue, Washington 98006 on behalf of Western Wireless Corporation.

Mark J. Ayotte, Attorney at Law, Briggs and Morgan, P.A., 2200 First National Bank Building, St. Paul, Minnesota 55101 on behalf of Western Wireless Corporation.

Thomas D. Kelsch of Kelsch Kelsch Ruff & Kranda PLLP, Attorneys at Law, P. O. Box 1266, Mandan, North Dakota 58554-7266 on behalf of Western Wireless Corporation.

Jan M. Sebby and Michael A. Bosh, Attorneys at Law, Pringle & Herigstad, PC, P. O. Box 1000, Minot, North Dakota 58702-1000 on behalf of the Rural Telephone Company Group, a group of rural telephone companies operating in North Dakota.

William W. Binek, Commerce Counsel, Public Service Commission, State Capitol, 600 East Boulevard Avenue, Bismarck, North Dakota 58505 as Hearing Officer.

Preliminary Statement

On August 17, 1998, Western Wireless Corporation (Western), doing business in North Dakota as Cellular One, filed with the Public Service Commission (Commission) an application to be designated as an eligible telecommunications carrier (ETC) in North Dakota. To be designated as an ETC the applicant must meet requirements set forth by

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Public Service Commission

**Second Findings of Fact, Conclusions of Law
and Order**

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the Federal Communications Commission for a service area designated by the state commission.

On September 2, 1998, the Commission issued a Notice of Hearing which identified issues to be considered by the Commission:

1. Is the designation of Western as an eligible telecommunications carrier in areas served by rural telephone companies in the public interest?
2. What is the appropriate universal service support area(s) for Western?
3. Does Western adequately offer the required universal services?
4. Does Western adequately advertise the availability of its universal services?
5. Does Western offer adequate Lifeline and Link Up services?
6. Is a waiver of any requirement necessary?

On September 23, 1998, the Rural Telephone Company Group (RTCG), an association of telecommunications companies doing business in North Dakota, filed a request to intervene in this proceeding. The RTCG was granted intervention by Commission Order dated October 1, 1998.

On October 14, 1998, U S WEST Communications, Inc. (U S WEST) filed a petition for intervention in this proceeding. U S WEST was granted intervention by Commission Order dated October 28, 1998.

On December 15, 1999, The Commission issued an order finding that Western should be designated as an ETC in North Dakota. The order designated Western as an ETC for the purpose of receiving federal universal service support in each existing non-rural local exchange in North Dakota conditioned upon the filing of a tariff for its universal service offering. The order did not designate Western as an ETC in rural local exchanges in North Dakota due to lack of evidence concerning the remaining issue of public interest.

Also on December 15, 1999, the Commission issued a notice to continue the hearing on January 31, 2000. In the Notice of Continued Hearing the Commission identified issues which were not decided in its December 15, 1999 order:

a. Is the designation of Western as an eligible telecommunications carrier in areas served by rural telephone companies in the public interest?

b. What is the appropriate universal service support area(s) for Western?

On November 3, 1999, the Commission issued its order in Case No. PU-2147-99-421 approving the transfer of certificates of public convenience and necessity held by Souris River Telecommunications Cooperative to SRT Communications, Inc. On February 3, 2000, Souris informed the Commission that the transaction for the merger of the two companies was completed on January 27, 2000.

On December 29, 1999, the Commission issued its order in Case No. PU-2190-99-573 approving the transfer certificates of public convenience and necessity held by Consolidated Telecom, Inc. to Consolidated Telephone Cooperative.

On December 29, 1999, the Commission issued its order in Case No. PU-2186-99-559 approving the transfer certificates of public convenience and necessity held by West River Communications, Inc. to West River Telecommunications Cooperative. On January 7, 2000, West River informed the Commission that the transaction for the merger of the two companies was completed on January 1, 2000.

On March 6, 2000, the parties filed simultaneous briefs and proposed findings according to a briefing schedule set by the Hearing Officer.

Findings of Fact

1. On May 8, 1997, the Federal Communications Commission (FCC) issued its Universal Service Report and Order, CC Docket 96-45, Order No. 97-157 (Order) implementing the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (Act). The FCC issued further orders to implement the Act on December 30, 1997, July 13, 1998, and October 26, 1998.

2. The Act provides for a state commission to designate a common carrier as an eligible telecommunications carrier:

(2) DESIGNATION OF ELIGIBLE TELECOMMUNICATIONS CARRIERS.— A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common

carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

47 U.S.C. § 214(e)(2)

3. The Act defines service area:

(5) SERVICE AREA DEFINED.— The term "service area" means a geographic area established by a State commission for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.

47 U.S.C. § 214(e)(5)

4. State law provides that the Commission has the power to:

12. Designate telecommunications companies as eligible telecommunications carriers to receive universal service support under sections 214 and 254 of the federal act. N.D.C.C. § 49-21-01.7(12).

5. State law provides that the Commission has the power to:

13. Designate geographic service areas for the purpose of determining universal service obligations and support mechanisms under the federal act. N.D.C.C. § 49-21-01.7(13).

6. Western, d/b/a Cellular One, is licensed by the FCC to provide cellular telecommunications services in North Dakota and presently provides such services to the exchange areas served by U S WEST and the exchange areas served by the RTCG using its own facilities. The Commission has granted a Certificate of Registration for MCII General Partnership, d/b/a Cellular One, to resell local exchange services in North Dakota.

7. Western seeks ETC designation in the North Dakota study areas of all rural telephone companies with more than 5,000 access lines. Those rural telephone companies comprise the RTCG in this proceeding and include: BEK Communications Cooperative, BEK Communications I, Inc., Consolidated Telephone Cooperative, Dakota Central Telecommunications Cooperative, Dakota Central Telecom I, Dickey Rural Telephone Cooperative, Dickey Rural Communications, Inc., North Dakota Telephone Company, Northwest Communications Cooperative, Polar Communications

Mutual Aid Corporation, Reservation Telephone Cooperative, SRT Communications, Inc., Turtle Mountain Communications, Inc., United Telephone Mutual Aid Corporation, and West River Telecommunications Cooperative.

8. For the reasons set forth in the Commission's December 15, 1999 order in this proceeding, Western Wireless is a common carrier, and has the intent and ability to offer and advertise the supported services set forth in 47 C.F.R. § 54.101(a) in North Dakota.

Public Interest

9. The RTCG through its witness Douglas Meredith alleges that the populations in a majority of the study areas served by the RTCG companies are projected to decline and therefore will not support competition in basic local exchange service.

10. The RTCG alleges that acceleration of competition for universal service in rural study areas, without a North Dakota universal service fund or some policy and procedure to assure rural carriers are able to remain financially healthy while fulfilling their carrier of last resort duties, all else being equal, will require sizable increases in local rates. These rate increases will cause customers to seek alternatives other than the rural carrier for telecommunications services. Losing additional customers will result in further revenue loss, thus requiring further increases in local service rates.

11. The RTCG states that Western will be able to target customers for whom costs are lowest, while receiving the benefit of universal service support for the higher costs associated with the exchange-wide universal service provided by incumbent wireline carriers. The RTCG states that Western will seek out the highest per-line federal support area and subscribe as many customers as it can to its service. This competition would be based on uneconomic incentives in the universal service support mechanism and not on the sound economic principles of supply and demand and therefore not in the public interest. Meredith states that the current system of portable federal support did not directly consider the possible negative impact of competition in rural areas.

12. The RTCG states that there is an economic reality of large investments in plant and equipment for telecommunications service in sparsely populated areas and in these instances, the public interest has been best served by creating the largest critical mass of customers for one carrier; thereby creating the best economics of scale for rural areas.

13. The RTCG states that Western's is offering a statewide local calling area in its telecommunications service package as compared to the more limited local calling areas of the RTCG companies. Because access revenues are a critical part of funding current universal services provided by the RTCG companies, it is not in the public interest to allow a carrier to receive universal support to finance a form of competition

that will undermine the current access revenue regime until such regime is systematically changed by state legislation. The RTCG does not believe Western ETC designation in areas served by rural carriers is in the public interest until policies and procedures for access charge reform, rebalancing local service rates, and a state support mechanism are working.

14. The RTCG alleges that granting Western ETC will lead to significant reduction in RTCG company access revenues that currently help to hold down the costs to consumers for essential services. The RTCG provides mathematical examples to depict the potential impact on an incumbent rural company's originating access revenue and residential and business customer rates when the top 5, 10, 15, and 20 percent of customers retain service from the rural carrier but also subscribe to Western for intrastate calls. Data was not available for SRT Communications and West River Telecommunications. The RTCG also provided mathematical examples to depict the potential impact on an incumbent rural company's revenues and residential and business customer rates when the top 5, 10, 15, and 20 percent of the customers migrate to Western completely and do not retain service from the incumbent rural carrier. From this analysis, the RTCG concludes that the personal benefits to the customers who migrate to Western do not outweigh the public interest for the remaining wireline customers.

15. The RTCG recommends that before designating an additional ETC in a rural area, the Commission should use demographic and economic data to determine whether the rural company's study area is able to sustain competition in universal services. When comparing rural companies that borrow funds from the Rural Utility Service (RUS), North Dakota is the ninth most sparsely populated state. The population of North Dakota is estimated to increase about three percent by the year 2015. Much of North Dakota's population growth will be in counties such as Burleigh, Cass, Richland, and Ward. Based on its conclusion that a majority of North Dakota rural carriers are serving areas of diminishing population, and a conclusion that those areas have lower than average median incomes, the RTCG concludes that the introduction of sustainable competition for universal services is severely inhibited. In rural company areas that project population growth, the RTCG concludes that the population growth is limited to selected counties and does not represent the entirety of the company's service area.

16. Western Wireless witness Gillian states that the question of whether granting Western ETC will further competition is not in dispute citing the Commission's December 15, 1999, order at finding paragraph 47. The Commission agreed that the public interest is served where there is a reasonable expectation that competition may have beneficial impacts for consumers.

17. Stating that the Commission in its December 15, 1999, found that the hearing should be continued due to the lack of evidence, and since the RTCG argues that the public interest question contains two parts, the benefits of competition and the preservation and advancement of universal service, and since the Commission already found that competition is, as a general matter, in the public interest, Western set out to

show that granting Western ETC will preserve and advance universal service. Western states that allowing consumers to choose their universal service provider should result in "more" universal service for the consumer, and not less universal service. Western states that many of the reasons that Western's designation as an ETC will preserve and advance universal service is because its designation will also promote competition and that it is wrong to assume that these goals conflict. Western believes that competition and universal service should be able to coexist side-by-side.

18. Western states that rural telephone customers are just as deserving of competitive choice as any urban customer and that competition cannot develop in high cost areas unless entrants can access high cost subsidies on an equal footing with incumbents. Witness Gillian states that granting Western ETC will place competition on an equal footing.

19. The testimony of Western witness Joseph Gillian includes a copy of the decision of the United States Court of Appeals, Fifth Circuit, on January 25, 2000, Case No. 98-60213, Alenco Communications, Inc. et al. v. Federal Communications Commission. In that proceeding, local exchange carriers serving predominantly small towns and rural areas petitioned for review of orders of the FCC making various changes to universal telecommunications service program. The Court states that:

Petitioners' various challenges fail because they fundamentally misunderstand a primary purpose of the Commissions Act—to herald and realize a new era of competition in the market for local telephone service while continuing to pursue the goal of universal service. They therefore confuse the requirement of sufficient support for universal service within a market in which telephone service providers compete for customers, which federal law mandates, with a guarantee of economic success for all providers, a guarantee that conflicts with competition.

The Act does not guarantee all local telephone service providers a sufficient return on investment; quite to the contrary, it is intended to introduce competition into the market. Competition necessarily brings the risk that some telephone providers will be unable to compete. The Act only promises universal service, and that is a goal that requires sufficient funding of customers, not providers. So long as there is sufficient and competitively-neutral funding to enable all customers to receive basic telecommunications services, the FCC has satisfied the Act and is not further required to ensure sufficient funding of every local telephone provider as well.

Petitioners fail to show that the FCC's various changes to the universal service support fund for high-cost loops unreasonably fails to provide sufficient funding for universal service or otherwise constitutes an arbitrary and capricious regulation under the Act.

"Sufficient" funding of the customer's right to adequate telephone service can be achieved regardless of which carrier ultimately receives the subsidy.

The methodology governing subsidy disbursements is plainly stated and made available to LEC's. What petitioners seek is not merely predictable funding mechanisms, but predictable market outcomes. Indeed, what they wish is protection from competition, the very antitheses of the Act.

Finally, petitioners object on the ground that portability violates the principle of predictability and the statutory command of sufficient funding. Specifically, they claim that, if just 25% of the revenue that the FCC has made portable is lost by a typical small LEC, the annual rate of return for interstate access service will, in many cases, fall to minus 10.53%.

As we have said, the Commission reasonably construed the predictability principle to require only predictable rules that govern distribution of the subsidies, and not to require predictable funding amounts. Indeed, to construe the predictability to require the latter would amount to protection from competition and thereby would run contrary to one of the primary purposes of the Act.

The Fifth Amendment protects utilities from regulations that are "so unjust as to be confiscatory." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307, 109 S.Ct. 609, 102 L.Ed.2d 646 (1989). Petitioners therefore must show that a regulation will "jeopardize the financial integrity of the companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital," or they must demonstrate that the reduced subsidies "are inadequate to compensate current equity holders for the risk associated with their investments under a modified prudent investment scheme." *Duquesne*, 488 U.S. at 312, 109 S.Ct. 609.

At the very least, therefore, petitioners must wait to experience the actual consequences of the Order before a court may even begin to consider whether the FCC has effected a constitutional taking. Until it is known what level of universal service funding each petitioner will receive under the Order, and under what circumstances the Commission will grant a waiver, we cannot seriously entertain a Takings Clause challenge.

Furthermore, petitioners do not present credible evidence that the Order ever will cause the drastic consequences for rural LEC's articulated in *Duquesne*. The mere fact that, "[f]or many rural carriers, universal service support provides a large share of the carriers' revenues," Order ¶294, is not enough to establish that the orders constitute a taking. The Fifth Amendment protects against takings; it does not confer a constitutional

right to government-subsidized profits. The Takings Clause thus erects no barrier to our Chevron and APA analysis.

Alenco Communications, Inc. et al. v. Federal Communications Commission, No. 98-60213, 2000 WL 60255 (5th Cir. Jan. 25, 2000) (footnotes omitted).

20. Western states that the relevant question is not whether competition will make life more challenging for incumbents, it is only whether customers can be expected to benefit. Should we allow telephone customers to choose who provides their universal service (and thus receives the universal service support, rather than the Commission intervening and making the choice for customers on the basis of financial harm to the company rather than financial harm to the customer? Western states that, before denying rural customers the type of competition that will become routine elsewhere, the RTCG should be required to make a compelling case that customers cannot be trusted to make this decision for themselves.

21. Witness Gillian further testifies that by allowing competition the incumbent local exchange companies will improve their quality and/or lower their prices to remain competitive.

22. Western argues that it is a myth that competition necessarily harms incumbents, or that a loss in market share must mean that the rates of other customers must rise. Not every dollar "lost" must be replaced by a rate increase. The incumbent can increase revenues from other existing services, new services can be introduced, and costs can be reduced through consolidation and other means. There is no reason to believe that these companies cannot adjust to, and succeed within, a competitive environment for universal service. There is no evidence to suggest that either those customers who stay with the incumbent or those customers who choose an alternative company will receive lower quality service or pay higher prices. They point out that in Regent, where Western has conducted a market trial for local service with its expanded calling area, universal service not only perseveres with competitive entry, but that it advances as well. Of approximately 120 households in Regent, Western is serving nearly half of the households and only a couple of these accounts have left the incumbent. In addition, the incumbent company responded to the competition with an expanded local calling area of its own. Western points out that both universal service and the customers in Regent benefited from the competition.

23. Western also argues that there is no reason to expect that any customer that is lost to a competitor is lost for the entire life of the asset.

24. Western argues another benefit to allowing competitive entry is that the customers of North Dakota's cooperatives have neither choice nor regulatory oversight that protects the customers of other local monopolies. Western also argues that, to the extent that being an "owner" of a cooperative protects these customers, then the cooperatives should have nothing to fear from competition; to the extent that customers

are unhappy with their cooperative, however, competition is the only way to provide them relief.

25. Western argues that the fact that most of the objecting incumbents are rural cooperatives makes it even more imperative that the Commission grant Western's request. These companies are monopolies, yet they are unregulated. If these cooperatives truly act in the best interests of their subscribers then they should have little to fear from entry and choice offered by Western. These cooperatives are unregulated under the presumption that Commission oversight is not needed to protect customer-owners from the decisions made by management. Yet here, the cooperatives are asking, in effect, for the Commission to protect management from the decisions of customer-owners in choosing an alternate carrier for local service.

26. Western provided basic financial information to show that the rural telephone companies are financially strong, with large cash reserves and significant investments in affiliated operations, despite declining populations in some areas of North Dakota.

27. In rural areas where the customer is required to first pay some portion of the investment to have facilities extended to their home or business, Western argues that its entry and provision of a wireless local loop, if Western can supply these new facilities less expensively, can save the incumbent investment cost while advancing universal service.

28. Western also states that, in many states, including states with substantial urban markets, there is the concern that local competition is focusing narrowly on large business customers and that residential competition is not developing. Western, however, is not only trying to bring competitive choice to residential customers, they are rural residential customers in high cost areas. Western finds that the Commission has already concluded that rural consumers deserve universal service choice when they are located in rural areas served by U S WEST, and there is no reason that consumers in similar areas served by the rural telephone should not have the same opportunity.

29. The decision of the United States Court of Appeals, Fifth Circuit, on January 25, 2000, Case No. 98-60213, Alenco Communications, Inc. et al. v. Federal Communications Commission finds that shortcomings in the federal plan to effect both local competition and universal service are the responsibility of the FCC:

The FCC must see to it that both universal service and local competition are realized; one cannot be sacrificed in favor of the other. The Commission therefore is responsible for making the changes necessary to its universal service program to ensure that it survives in the new world of competition. Because Congress has conferred broad discretion on the agency to negotiate these dual mandates, courts ought not lightly interfere with its reasoned attempt to achieve both objectives.

Alenco Communications, Inc. et al. v. Federal Communications Commission, No. 98-60213, 2000 WL 60255 (5th Cir. Jan. 25, 2000) (footnotes omitted).

30. Gary R. Kostelecky, President, North Dakota 911 Association, testified that the Association could not support the introduction of wireless technology on a wide spread basis because the wireless technology is incompatible with the existing 911 system infrastructure. Currently, when a 911 call is placed using wireless technology, the 911 dispatcher does not get the caller's phone number or the caller's location. Kostelecky asked that the Public Service Commission require that the wireless technology be compatible before approving the expansion of this type of telephone service. Kostelecky testified that the wireless companies should provide contribution to help recover the costs associated with making the wireless and 911 systems compatible.

31. Pete Eggimann, Director of the Grand Forks Emergency Communications Center, also representing the North Dakota 911 Association, re-affirmed the testimony of Gary Kostelecky and recommended that any new telecommunication technology application must be compatible with the Enhanced 911 system before it is put into wide spread use. He testified that such a requirement would level the playing field for all competing service providers; and provide the residents of North Dakota with the level of public safety access that they already assume they must have.

32. In response to questions at the hearing, Kostelecky conceded that a commercial mobile radio service provider's requirement for delivery of E911 is a matter of federal law, governed by FCC orders.

33. In its brief, Western states that it will continue to work with the North Dakota 911 Association on the E911 issues. Western states that the Commission in its December 15, 1999, order had already determined that Western provides access to emergency services in compliance with FCC rules governing E911 implementation. Western also stated that it stands ready to provide E911 service upon request by local E911 administrators.

34. The Commission finds that, at this time, it is not in the public interest to grant Western ETC status.

Universal Service Support Areas

35. The Commission must establish a geographic area for the purpose of determining universal service obligations and support mechanisms for each designated eligible telecommunications carrier.

36. Since the Commission is not granting Western ETC status, there is no reason to establish a geographic area for the purpose of determining universal service obligations and support mechanisms.

Conclusions of Law

1. The Commission has jurisdiction over this matter.
2. Western is a common carrier of commercial mobile radio services (CMRS) as defined by 47 U.S.C. § 153(h) and 47 C.F.R. § 20.9(a)(7).
3. Under N.D.C.C. § 49-21-01.7(12) the Commission has the power to designate telecommunications carriers to receive universal service support under sections 214 and 254 of the federal act.
4. Under N.D.C.C. § 49-21-01.7(13) the Commission has the power to designate geographic service areas for the purpose of determining universal service obligations and support mechanisms under the federal act.
5. Under 47 U.S.C. § 214(e)(2), the Commission is required to designate a common carrier that meets the requirements of 47 U.S.C. § 214(e)(1) as an eligible telecommunications carrier for a service area designated by the Commission. The Commission, may designate, in the case of an area served by a rural telephone company, and must designate, in the case of all other areas, more than one common carrier as an eligible telecommunications carrier. However, before designating an additional carrier for an area served by a rural telephone company, the Commission must find that the designation is in the public interest.
6. Under 47 U.S.C. § 214(e)(1), a common carrier that is designated as an eligible telecommunications carrier must, throughout its service area, offer the services that are supported by federal universal service support mechanisms either using its own facilities or a combination of its own facilities and resale of another carrier's services. The carrier must also advertise the availability of such services and the rates for the services using media of general distribution.
7. Under 47 C.F.R. § 54.405; 47 C.F.R. § 54.411, as part of its obligations as an eligible telecommunications carrier, the carrier is required to make available Lifeline and Link Up services to qualifying low-income consumers.
8. Western qualifies as an Eligible Telecommunications Carrier as defined by the Telecommunications Act of 1996, 47 U.S.C. § 214 and 47 C.F.R. § 54.1 et seq., for the purpose of receiving federal universal service support.
9. The State of North Dakota has not established a state universal service fund. Accordingly, Western's application must be limited to designation for federal universal service support.

Order

The Commission orders:

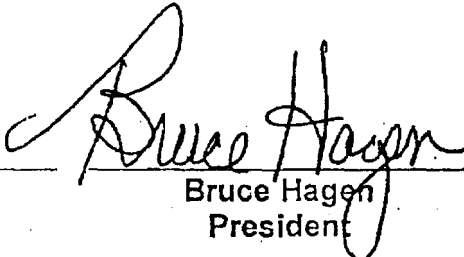
1. Western Wireless Corporation's application to be designated as an eligible telecommunications carrier for the purpose of receiving federal universal service support in each existing study area of BEK Communications Cooperative, BEK Communications I, Inc., Consolidated Telephone Cooperative, Dakota Central Telecommunications Cooperative, Dakota Central Telecom I, Dickey Rural Telephone Cooperative, Dickey Rural Communications, Inc., North Dakota Telephone Company, Northwest Communications Cooperative, Polar Communications Mutual Aid Corporation, Reservation Telephone Cooperative, SRT Communications, Inc., Turtle Mountain Communications, Inc., United Telephone Mutual Aid Corporation, and West River Telecommunications Cooperative is denied.

2. The NDPSC, if requested, will re-open this case after the FCC Federal-State Joint Board on Universal Service recommends and the FCC provides funds to adequately support universal service in high cost areas. The same consideration will prevail when the North Dakota Legislature establishes a state universal service fund to support universal service in high cost areas in North Dakota. The North Dakota Public Service Commission will consider the effects of the Federal Universal Service Fund and the State Universal Service Fund to meet Congress's mandate for adequate services and reasonable, comparable rural and urban prices for these services when this case is re-opened.

PUBLIC SERVICE COMMISSION


"NAY"

Susan E. Wefald
Commissioner


Bruce Hagen
President
Leo M. Reinbold
Commissioner

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Western Wireless Corporation
Designated Eligible Carrier
Application

Case No. PU-1564-98-428

CONCURRING OPINION
Commissioner Bruce Hagen

April 26, 2000

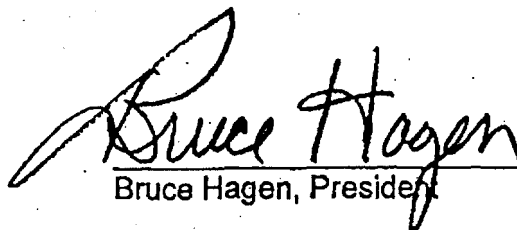
After considering all of the evidence from two hearings in this case, I am not convinced that it is in the public interest for there to be a competing eligible carrier in rural areas in North Dakota.

Rural North Dakota is facing serious economic difficulties. With declining populations in 40 of our 53 counties, I am concerned about the future of our rural telephone system. It is critical that our existing rural telephone infrastructure be maintained.

The rural telephone system in North Dakota has been subsidized for over 60 years. It has not been a simple or easy process to bring telephone service to the rural people in North Dakota, but this has been done by the very dedicated local exchange telephone companies who serve our rural areas.

Under the 1996 federal telecommunications law, state commissions were given the power to designate eligible telecommunications carriers in the rural areas of the United States. Congress included a mandate in that law which clearly states that adequate telephone service and reasonable, comparable rural and urban prices for these services is the standard that this country is to follow.

Currently, North Dakota does not have a state universal service fund, nor has the final federal universal service fund been decided by the Federal Communications Commission. Consequently, when there is additional information regarding both state and federal universal service programs, the issue of public interest may be re-addressed.


Bruce Hagen, President

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Western Wireless Corporation
Designated Eligible Carrier
Application

Case No. PU-1564-98-428

DISSENT OF COMMISSIONER WEFALD

April 26, 2000

I Dissent.

The main emphasis when this Commission considers universal service should be sufficient funding of customer telecommunications service, not adequate funding of telecommunications providers.

I agree with the opinion of the *United States Court of Appeals, Fifth Circuit, Case No. 98-60213, Alenco Communications, Inc. et al. v. Federal Communications Commission*, issued on January 25, 2000, and included in findings 19 and 29 in this order. While this order relates to responsibilities of the Federal Communications Commission, it provides important guidance to state commissions as they make decisions on who will receive eligible carrier funding.

A key sentence in the Court of Appeals decision is included in finding #19 of this order. It states: "The Act does not guarantee all local telephone service providers a sufficient return on investment; quite the contrary, it is intended to introduce competition into the market. Competition necessarily brings the risk that some telephone providers will be unable to compete. The Act only promises universal service, and that is a goal that requires sufficient funding of customers, not providers. (emphasis added)" The order goes on to say, " 'Sufficient' funding of the customers right to adequate telephone service can be achieved regardless of which carrier ultimately receives the subsidy."

It is very important that this Commission focus on customers and not on companies as we make important decisions on universal service funding. Some people argue that Western Wireless Corporation (Western) is a large company, and since it is large and already providing service in North Dakota, that it does not need universal service funds. However, the commission has already determined that Western provides all of the basic services that are needed to qualify for Eligible Telecommunications Carrier (ETC) status. (See Conclusions of Law, #8) Thus, it is only fair to give Western's local service customers the opportunity to have lower prices in our rural areas.

Western seeks to be designated an ETC in the North Dakota study areas of all rural telephone companies with more than 5,000 access lines. These companies are

listed in Finding #7 of this order. Included in this list are several telecommunications companies that serve quite a large number of customers. For example, SRT Communications Inc., which serves Minot and the surrounding area serves 45,620 lines, North Dakota Telephone Company which serves Devils Lake and the surrounding area serves 18,786 lines, and West River Telecommunications Cooperative serves 16,733 lines. I suggested at the work session that we allow Western Wireless ETC status in these areas, but received no support for this idea from my fellow commissioners.

Also, I object to Conclusions of Law #2. How can a present Commission tie the hands of a future Commission by stating in the conclusions of law what the future Commission will consider? This is particularly inappropriate when Commissioner Hagen will not be on the Commission when the conditions imposed are met. This whole paragraph should be removed from the order.

I hope that Western is still interested in being designated an ETC in the future. When the 1996 Telecommunications Act was passed by Congress, many people wondered if we would have the opportunity to have any competition in our rural areas. Now we have a company that wants to serve rural customers, and we are putting up road blocks in their path.

Western wants to offer local service with new technologies. We may be holding our state back in developing new technologies by not granting ETC status to Western.

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Western Wireless Corporation
Designated Eligible Carrier
Application

Case No. PU-1564-98-428

AFFIDAVIT OF SERVICE BY CERTIFIED MAIL

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

Sharon Helbling deposes and says that:

she is over the age of 18 years and not a party to this action and, on the 27th day of **April, 2000**, she deposited in the United States Mail, Bismarck, North Dakota, **six** envelopes with certified postage, return receipt requested, fully prepaid, securely sealed and each containing a photocopy of:

Second Findings of Fact, Conclusions of Law and Order

The envelopes were addressed as follows:

Gene DeJordy Esq
Western Wireless Corp
3650 131st Ave SE #400
Bellevue WA 98006
Cert. No. Z324 719 747

Dan Kuntz
P O Box 1695
Bismarck ND 58502-1695

Cert. No. Z324 719 749

Mark J Ayotte
Briggs & Morgan P A
2200 First National Bank Bldg
St Paul MN 55101
Cert. No. Z324 719 755

Jan Sebbby
P O Box 1000
Minot ND 58702-1000

Cert. No. Z324 719 748

John Munn
U S WEST
1801 California St
Denver CO 80202
Cert. No. Z324 719 750

Thomas D Kelsch
Kelsch Kelsch Ruff & Kranda PLLP
P O Box 1266
Mandan ND 58554-1266
Cert. No. Z324 719 756

Each address shown is the respective addressee's last reasonably ascertainable post office address.

Subscribed and sworn to before me
this 27th day of April, 2000.

Notary Public

SEAL

2200 FIRST NATIONAL BANK BUILDING
332 MINNESOTA STREET
SAINT PAUL, MINNESOTA 55101
TELEPHONE (651) 223-6600
FACSIMILE (651) 223-6450

BRIGGS AND MORGAN

PROFESSIONAL ASSOCIATION

WRITER'S DIRECT DIAL

(651) 223-6561

WRITER'S E-MAIL

ayomar@briggs.com

May 15, 2000

CONFIDENTIAL**VIA FEDERAL EXPRESS**

Gene DeJordy
Executive Director of Regulatory Affairs
Western Wireless Corporation
3650 - 131st Avenue S.E., Suite 400
Bellevue, WA 98006

VIA FACSIMILE - (202) 637-5910

Michele Farquhar, Esq.
Ronnie London
Hogan & Hartson L.L.P.
Columbia Square
555 13th Street N.W.
Washington, D. 20004-1109

**Re: In the Matter of the Filing by GCC License Corporation for Designation as an
Eligible Telecommunications Carrier
Court File No. 99-235**

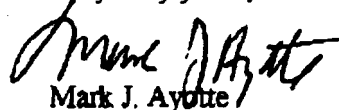
Dear Gene and Michele:

Please find enclosed a copy of the South Dakota Public Utilities Commission's Notice of Appeal and Appellant's Docketing Statement concerning the above-captioned matter. Specifically, the South Dakota Commission is appealing the Findings of Fact, Conclusions of Law and Order dated March 22, 2000. Based on the statement of issues set forth in the Docketing Statement, it is clear the Commission seeks review of the "chicken and egg" issue. Item 6(g) seeks review of whether 47 U.S.C. § 214(e)(1)-(2) merely requires the Commission to determine whether an application for ETC designation is capable of providing the supported services after it is designated an ETC.

Based on this action, I would hope the FCC would now proceed to issue a decision on the preemption petition. Please review and call me to discuss any questions.

Gene, on a related matter, I note that Steve Sanford is still listed as counsel of record. We will need local counsel on this appeal. Please call me to discuss.

Very truly yours,


Mark J. Ayotte

MJA:dc
Enclosures

cc: Phil Schenkenberg (w/enclosures)

MINNEAPOLIS OFFICE • IDS CENTER • WWW.BRIGGS.COM

1168526.1

MEMBER - LEX MUNDI A GLOBAL ASSOCIATION OF INDEPENDENT LAW FIRMS

**STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)**

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF)
)
THE FILING BY GCC LICENSE)
CORPORATION FOR DESIGNATION AS)
AN ELIGIBLE TELECOMMUNICATIONS)
CARRIER)

CIV. 99-235

NOTICE OF APPEAL

TO: STEVEN W. SANFORD, MARK J. AYOTTE AND PHILIP R. SCHENKENBERG, COUNSEL FOR GCC LICENSE CORPORATION; ALEX DUARTE; THOMAS J. WELK AND TAMARA A. WILKA, COUNSEL FOR U S WEST COMMUNICATIONS, INC.; RICHARD D. COIT, COUNSEL FOR SOUTH DAKOTA INDEPENDENT TELEPHONE COALITION; AND WILLIAM P. HEASTON AND BARBARA E. BERKENPAS, COUNSEL FOR DAKOTA TELECOMMUNICATIONS GROUP, INC.

Notice is hereby given that the South Dakota Public Utilities Commission (Commission) appeals to the Supreme Court of the state of South Dakota from the Findings of Fact, Conclusions of Law, and Order dated March 22, 2000, in Civ. 99-235, and the entire record relating thereto. The Court reversed the Commission's Findings of Fact and Conclusions of Law; Notice of Entry of Order in Docket TC98-146 entitled "In the Matter of the Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier." Notice of Entry of Findings of Fact, Conclusions of Law, and Order was served on March 24, 2000.

Dated this 10 day of May, 2000.

Rolayne Ailts Wiest
 Rolayne Ailts Wiest
 Special Assistant Attorney General
 South Dakota Public Utilities Commission
 500 East Capitol
 Pierre, SD 57501
 Telephone (605) 773-3201

**Attorney for South Dakota Public Utilities
Commission**

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IN THE MATTER OF)	CIV. 99-
)	
THE FILING BY GCC LICENSE CORPORATION FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER)))))	APPELLANT'S DOCKETING STATEMENT

SECTION A.

TRIAL COURT

1. The circuit court from which the appeal is taken: The Sixth Judicial Circuit.
2. The county in which the action is venued at the time of the appeal: Hughes County.
3. The name of the trial judge who entered the decision appealed: The Honorable James W. Anderson.

PARTIES AND ATTORNEYS

4. Identify each party presently of record and the name, address, and telephone number of the attorney for each party: SEE ATTACHED APPENDIX.

SECTION B.

TIMELINESS OF APPEAL

1. The date of the judgment or order appealed from was signed and filed by the trial court: March 22, 2000.
2. The date notice of entry of the judgment or order was served on each party: March 24, 2000.
3. State whether either of the following motions were made:
 - a. Motion for judgment n.o.v., SDCL 15-6-50(b): Not Applicable
 - b. Motion for new trial, SDCL 15-6-59: Not Applicable

NATURE AND DISPOSITION OF CLAIMS

4. State the nature of each party's separate claims, counterclaims, or cross-claims and the trial court's disposition of each claim.

This is an administrative appeal pursuant to SDCL Chapter 1-26 from a decision of the Public Utilities Commission of South Dakota (Commission) in Docket TC98-146, *In the Matter of the Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, Findings of Fact and Conclusions of Law; Notice of Entry of Order, issued May 19, 1999. In that order, the Commission denied GCC License Corporation's (GCC) application for designation as an eligible telecommunications carrier (ETC). GCC appealed the decision to Circuit Court, raising the following four issues:

ISSUE 1: Whether the Commission erred by determining that 47 U.S.C. § 214(e) requires an applicant for ETC designation to be actually offering or providing the supported services prior to obtaining designation.

RULING: The Circuit Court ruled that section 214 required only that an applicant be capable of meeting ETC obligations.

ISSUE 2: Whether the Commission erred by finding GCC does not currently provide the supported services set forth in 47 C.F.R. § 54.101(a) in satisfaction of the requirement for ETC designation under 47 U.S.C. § 214(e)(1).

RULING: The Circuit Court ruled that GCC currently provides all of the supported services.

ISSUE 3: Whether the Commission erred by finding that GCC cannot provide a universal service offering throughout its requested designated service area in satisfaction of the requirement for ETC designation under 47 U.S.C. § 214(e)(1).

RULING: The Circuit Court ruled that GCC can offer universal service immediately upon designation and can provide universal service to all who request it.

ISSUE 4: Whether the Commission erred by concluding that it may designate more than one ETC if the additional requesting carrier meets the requirements of section 214(e)(1).

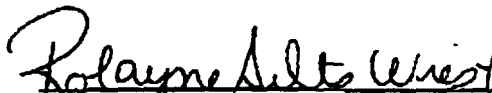
RULING: The Circuit Court ruled that the Commission is required to designate a common carrier that meets the requirements of section 214(e)(1) as an ETC for a service area designated by the Commission.

5. Appeals of right may be taken only from final, appealable orders. See SDCL 15-26A-3 and 4.
 - a. Did the trial court enter a final judgment or order that resolves all of each party's individual claims, counterclaims or cross-claims? Yes
 - b. If the trial court did not enter a final judgment or order as to each party's individual claims, counterclaims or cross-claims, did the trial court make a determination and direct entry of judgment pursuant to SDCL 15-6-54(b)? Not Applicable
6. State each issue intended to be presented for review. (Parties will not be bound by these statements).
 - a. Whether the Commission's decision denying GCC ETC status should be affirmed pursuant to SDCL 1-26-36.
 - b. Whether the Circuit Court erred in finding that the Commission must designate a common carrier that meets the requirements of section 214(e)(1) as an ETC.
 - c. Whether the Commission's finding that GCC does not currently provide all of the supported services required by the FCC through its existing mobile cellular services is clearly erroneous.
 - d. Whether the Commission's finding that GCC's provisioning of service through its existing mobile cellular services is not sufficiently comparable to its proposed fixed wireless service is clearly erroneous.
 - e. Whether the Commission's decision that GCC failed to show it could offer universal service throughout the state upon designation as an ETC is clearly erroneous.
 - f. Whether the Circuit Court improperly applied the de novo standard to the Commission's findings of fact.
 - g. Whether the Circuit Court erred in finding that 47 U.S.C. § 214(e)(1)-(2) merely requires the Commission to determine whether an

applicant for ETC designation is capable of providing the supported services after it is designated an ETC.

- h. Whether the Circuit Court erred in finding that the Commission's decision required an applicant for ETC designation to show it is providing a universal service offering to every location in the requested designated service area.

Dated this 10 day of May, 2000.



Rolayne Ailts Wiest
Special Assistant Attorney General
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
Telephone (605) 773-3201

Attorney for South Dakota Public Utilities
Commission

Attached: *In the Matter of the Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier, Findings of Fact and Conclusions of Law, Notice of Entry of Order, Docket TC98-146, issued May 19, 1999.*

Circuit Court's Findings of Fact, Conclusions of Law, and Order, CIV. 99-235, The Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier.

4. PARTIES AND ATTORNEYS

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Attorneys for Dakota Telecommunications Group, Inc.

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE FILING BY GCC)	FINDINGS OF FACT AND
LICENSE CORPORATION FOR DESIGNATION)	CONCLUSIONS OF LAW;
AS AN ELIGIBLE TELECOMMUNICATIONS)	NOTICE OF ENTRY OF
CARRIER)	ORDER
)	TC98-146

On August 25, 1998, the South Dakota Public Utilities Commission (Commission) received a request from GCC License Corporation (GCC) requesting designation as an eligible telecommunications carrier (ETC) for all the exchanges contained within all of the counties in South Dakota.

On August 26, 1998, the Commission electronically transmitted notice of the filing and the intervention deadline of September 11, 1998, to interested individuals and entities. At its September 23, 1998, meeting, the Commission granted intervention to Dakota Telecommunications Group, Inc. (DTG), South Dakota Independent Telephone Coalition (SDITC), and U S WEST Communications, Inc. (U S WEST).

The Commission set the hearing for December 17 and 18, 1998, starting at 9:00 A.M., on December 17, 1998, in Room 412, State Capitol, Pierre, South Dakota. The issue at the hearing was whether GCC should be granted designation as an eligible telecommunications carrier for all the exchanges contained within all of the counties in South Dakota. The hearing was held as scheduled and briefs were filed following the hearing. At its April 26, 1999, meeting, the Commission unanimously voted to deny the application.

Based on the evidence of record, the Commission makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On August 25, 1998, GCC filed an application requesting designation as an ETC for all of the counties within South Dakota. Exhibit 1. GCC's application listed counties it was requesting for ETC status instead of exchanges because it did not know all the exchanges in the state. Tr. at 40. GCC currently provides mobile cellular service in South Dakota. Tr. at 19. GCC uses the trade name of Cellular One. Tr. at 76. GCC is a wholly-owned subsidiary of Western Wireless Corporation (Western Wireless). Tr. at 22.

2. Pursuant to 47 U.S.C. § 214(e)(2), the Commission is required to designate a common carrier that meets the requirements of section 214(e)(1) as an ETC for a service area designated by the Commission. The Commission may designate more than one ETC if the additional requesting carrier meets the requirements of section 214(e)(1). However, before designating an additional ETC for an area served by a rural telephone company, the Commission must find that the designation is in the public interest. 47 U.S.C. §

214(e)(2). GCC is requesting designation as an additional ETC throughout the state. Exhibit 3 at 10. South Dakota exchanges are served by both nonrural and rural telephone companies.

3. Pursuant to 47 U.S.C. § 214(e)(1), a common carrier that is designated as an ETC is eligible to receive universal service support and shall, throughout its service area, offer the services that are supported by federal universal service support mechanisms either using its own facilities or a combination of its own facilities and resale of another carrier's services. The carrier must also advertise the availability of such services and the rates for the services using media of general distribution.

4. The Federal Communications Commission (FCC) has designated the following services or functionalities as those supported by federal universal service support mechanisms: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equal; (4) single party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; (8) access to directory assistance; and (9) toll limitation for qualifying low-income consumers. 47 C.F.R. § 54.101(a).

5. As part of its obligations as an ETC, an ETC is required to make available Lifeline and Link Up services to qualifying low-income consumers. 47 C.F.R. § 54.405; 47 C.F.R. § 54.411.

6. GCC asserts that it currently provides all of the services as designated by the FCC through its existing mobile cellular services. Tr. at 123. Cellular service is generally provisioned as a mobile service. Tr. at 25.

7. Although GCC stated that its existing mobile cellular services currently provide all of the services supported by universal service, GCC intends to offer universal service initially through a fixed wireless offering. Exhibit 4 at 7. GCC specifically stated that it is not seeking universal service funding for the mobile cellular service that it currently provides. Exhibit 3 at 8.

8. GCC states that the Commission can look at the current mobile services it provides to determine whether it meets ETC requirements because GCC would use the same network infrastructure to provision its fixed wireless service. Tr. at 29. The Commission disagrees, and finds that it cannot base its decision on whether to grant ETC status to GCC based on GCC's current mobile cellular service because it is not sufficiently comparable to its proposed fixed wireless system. GCC's own statements support this finding.

9. For example, GCC stated that "[b]ecause GCC's cellular network is designed to serve mobile customers, it would be inappropriate to compare the voice quality using a handheld mobile phone with the voice quality of a fixed wireline service. This is so because GCC's cellular network has been designed to serve mobile customers that may be close to, and in direct line-of-sight of, a transmitter or several miles from, and not in line-of-sight of, a

transmitter. To optimize voice quality for its universal service customers, GCC will construct additional antenna towers, as necessary, and will install fixed wireless network equipment (antennas and transmitters) at customer locations, as it did in Nevada where the Company provides universal service to residential and business customers." Exhibit 4 at 12.

10. Further, GCC conceded that there were currently gaps in coverage but stated that the current mobile service is difficult to compare to a fixed wireless service which will have telephones with greater power plus antennas. Tr. at 99.

11. Thus, the Commission finds that since GCC's universal service offering will be initially based on a fixed wireless system the Commission must look at whether the proposed fixed wireless system meets ETC requirements, not whether the existing mobile cellular service provides all of the services supported by universal service.

12. Even if the Commission could base its decision to grant ETC status on GCC's current provisioning of mobile cellular service, the Commission would be compelled to deny GCC ETC status. First, GCC does not offer a certain amount of free local usage. See 47 C.F.R. § 54.101(a)(2). Under current cellular service the subscriber pays for both incoming and outgoing calls. Tr. at 38. Second, as stated earlier, GCC's mobile cellular service has gaps in coverage that it hoped to fix through the use of a fixed wireless system. Tr. at 99. Therefore, the Commission finds that GCC has failed to show that its current mobile cellular system is able to offer all the services that are supported by federal universal support mechanisms throughout the state.

13. GCC also stated in its prefiled testimony and at the hearing that it intended to deploy personal communications service (PCS) and local multi-point distribution service (LMDS) in South Dakota. Exhibit 4 at 3. GCC initially stated that it holds PCS licenses to serve the entire state of South Dakota. *Id.* Later it was learned that Western PCS BTA1 License Corporation (Western PCS) owns the radio licenses for PCS in South Dakota. Tr. at 22. Western PCS is an indirect majority-owned subsidiary of Western Wireless. *Id.* Western PCS has not deployed any PCS systems in South Dakota. Tr. at 27.

14. GCC initially stated that it holds LMDS licenses to serve the entire state of South Dakota. Exhibit 4 at 3. Later it was learned that Eclipse Communications Corporation (Eclipse) owns the radio licenses in South Dakota for LMDS. Tr. at 22. Eclipse is a wholly-owned subsidiary of Western Wireless. *Id.* In addition, at the hearing, a question was raised as to whether Eclipse had, in fact, received licenses for all of the BTAs in South Dakota. Tr. at 25. Eclipse is in the initial stages of designing and implementing LMDS. Tr. at 27.

15. The Commission finds it is unclear whether GCC intended to offer universal service through PCS or LMDS. However, the Commission finds that if universal service is eventually offered through PCS or LMDS, then Western PCS BTA1 or Eclipse may be the proper companies to apply for ETC status.

16. The Commission finds that it is clear from the record that GCC will initially rely upon a fixed wireless system to offer universal service. Therefore, the Commission shall look at whether the proposed fixed wireless system meets the ETC requirements.

17. GCC does not currently provide fixed wireless loops to any customer in South Dakota. Tr. at 28. GCC has not deployed fixed wireless because there has been no customer demand for the service. Tr. at 101. GCC believed that with a universal service offering, then a customer may want a fixed unit. Id.

18. The Commission finds that since GCC is not actually offering or providing a universal service offering through a fixed wireless system, it must deny GCC's application for ETC status throughout the state. Pursuant to 47 U.S.C. § 214(e)(2), the Commission may designate an additional requesting carrier as an ETC if it "meets the requirements of paragraph (1)." Paragraph one requires an ETC to offer the supported services throughout the area and advertise the availability of such services. GCC is not offering fixed wireless service nor is it advertising the availability of a fixed wireless service throughout South Dakota. Although GCC argues that there is no requirement that a requesting carrier actually offer the services at the time of its application, the plain language of the statute reads otherwise.

19. Moreover, GCC's application clearly demonstrates the reasons why a requesting carrier must actually be offering the supported services before applying for ETC status. The record shows that since GCC is not currently providing services through fixed wireless, it is impossible to determine whether GCC will meet ETC requirements when it actually begins to provide a universal service offering through a fixed wireless system.

20. First, it is unclear whether all customers in the state would be able to use a fixed wireless system if the Commission had granted ETC status to GCC. GCC has applied for ETC status in 13 states and asserted that it would be able to implement universal service immediately if it were designated an ETC. Tr. at 65. However, GCC's current network infrastructure does not serve the entire state. Tr. at 31, 80-81; Exhibit 9. GCC admitted that it could not provide service to every location in South Dakota. Tr. at 99. GCC would have to make changes and improvements to its network infrastructure in order to improve its voice quality for fixed wireless customers. Exhibit 4 at 12. It would need to construct additional cell sites as well as install high gain antennas and network equipment at customer locations. Exhibit 4 at 7-8; Tr. at 109-110. The antennas would either be a small antenna attached to a fixed unit or a permanent antenna on the roof. Tr. at 92.

21. As an example of a fixed wireless offering, GCC noted the provisioning of fixed wireless service in Reese River Valley and Antelope Valley in Nevada and in North Dakota. Exhibit 4 at 8; Tr. at 100. In both of those cases, GCC had to put in extra cell sites to improve its fixed wireless service. Tr. at 99-100. In Nevada, GCC had to construct another cell site in order to give customers improved service because the original fixed wireless system had problems with blocking. Id.

22. Even if the Commission could grant a company ETC status based on intentions to serve, the Commission finds that GCC has failed to show that its proposed fixed wireless system could be offered to customers throughout South Dakota immediately upon being granted ETC status.

23. Second, GCC has not yet finalized what universal service offering it plans to offer to consumers. Exhibit 4 at 13. This lack of a definite plan creates questions as to its ability to offer universal service based on fixed wireless technology throughout the entire state. For example, GCC first stated that it had not set a rate for its universal service offering because GCC would first need to know what forms of subsidies it would receive. Tr. at 33-34, 89, 114. GCC's position was that it was difficult to know whether GCC would price service at \$15.00 a month when it does not know whether it will have access to the same subsidies that are currently received by the incumbent local exchange companies. Tr. at 89. GCC referenced its offering of fixed wireless service in Reese River Valley and Antelope Valley, Nevada where it provided unlimited local usage for a flat monthly rate and stated that in Nevada the subsidies were known so GCC could provide service at that rate because it knew its costs would be covered. Tr. at 34-35. In addition, GCC would need to construct additional cell sites at an average cost of \$200,000 per site. Tr. at 109, 133. GCC stated that it would pay for any necessary antennas. Tr. at 102. GCC asserted that it would provide customer premise equipment and that all of these expenses would be factored into the cost of providing the service. Tr. at 109, 110. The units that are attached to the houses cost approximately \$300 to \$400 per unit. Tr. at 72. However, at the same hearing, GCC also stated it would provide service at a price comparable to that charged by the incumbent local exchange company. Tr. at 95.

24. The Commission finds that GCC's statements on pricing demonstrate the lack of a clear, financial plan to provision fixed wireless service throughout the state. If GCC needs to know what subsidies it may receive before pricing its service to ensure that its costs will be covered, then the Commission does not understand how it can also say that the price of that service will be comparable with that charged by the incumbent local exchange company. GCC did not show to the Commission that it had a viable financial plan to provide fixed wireless service throughout South Dakota.

25. Moreover, GCC's references to its provisioning of fixed wireless service in Reese River Valley and Antelope Valley, Nevada, only strengthens the Commission's concerns as to the viability of GCC's being able to offer a fixed wireless service throughout South Dakota. In Reese River Valley and Antelope Valley, Nevada, customers paid \$13.50 for fixed wireless service. Exhibit 10 at 7. However, this service was highly subsidized. Nevada Bell was billed by GCC for cellular charges that exceeded the flat local rate. *Id.* at 13-14. GCC charged Nevada Bell 37 cents a minute during the day and 25 cents a minute at night for each minute that exceeded the flat monthly rate. *Id.* at 14; Tr. at 70. Nevada Bell also paid for summary billing reports which were estimated to cost approximately \$14,000. Exhibit 10 at 13; Tr. at 69. GCC was also authorized to bill Nevada Bell for non-recurring charges. Exhibit 10 at 15.

26. The Commission finds that if GCC were actually providing a universal service offering throughout the state by the use of a fixed wireless system, then the Commission would know whether there were problems with the provisioning of the service, whether GCC was offering all of the supported services, and whether it was able to offer service to customers throughout the state of South Dakota.

27. Since the Commission finds that GCC is not currently offering the necessary services to support the granting of ETC designation, the Commission need not reach the issue of whether granting ETC status to GCC in areas served by rural telephone companies is in the public interest.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26 and 49-31, including 1-26-18, 1-26-19, 49-31-3, 49-31-7, 49-31-7.1, 49-31-11, and 49-31-78, and 47 U.S.C. § 214(e)(1) through (5).

2. Pursuant to 47 U.S.C. § 214(e)(2), the Commission is required to designate a common carrier that meets the requirements of section 214(e)(1) as an ETC for a service area designated by the Commission. The Commission may designate more than one ETC if the additional requesting carrier meets the requirements of section 214(e)(1). However, before designating an additional ETC for an area served by a rural telephone company, the Commission must find that the designation is in the public interest. 47 U.S.C. § 214(e)(2).

3. Pursuant to 47 U.S.C. § 214(e)(1), a common carrier that is designated as an ETC is eligible to receive universal service support and shall, throughout its service area, offer the services that are supported by federal universal service support mechanisms either using its own facilities or a combination of its own facilities and resale of another carrier's services. The carrier must also advertise the availability of such services and the rates for the services using media of general distribution.

4. The FCC has designated the following services or functionalities as those supported by federal universal service support mechanisms: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equal; (4) single party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; (8) access to directory assistance; and (9) toll limitation for qualifying low-income consumers. 47 C.F.R. § 54.101(a).

5. As part of its obligations as an ETC, an ETC is required to make available Lifeline and Link Up services to qualifying low-income consumers. 47 C.F.R. § 54.405; 47 C.F.R. § 54.411.

6. The Commission finds that pursuant to 47 U.S.C. § 214(e), an ETC must be actually offering or providing the services supported by the federal universal service support mechanisms throughout the service area before being designated as an ETC. GCC intends to provide a universal service offering initially through a fixed wireless system. However, it does not currently offer fixed wireless service to South Dakota customers. The Commission cannot grant a company ETC status based on intentions to serve.

7. The Commission finds that since it finds that GCC is not currently offering the necessary services to support the granting of ETC designation, it need not reach the issue of whether granting ETC status to GCC in areas served by rural customers is in the public interest.

It is therefore

ORDERED, that GCC's application requesting designation as an ETC for all of the exchanges contained within all of the counties in South Dakota is denied.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 19th day of May, 1999. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 19th day of May, 1999.

CERTIFICATE OF SERVICE	
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.	
By:	<u>William Kelsch</u>
Date:	<u>5/19/99</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

James A. Burg
JAMES A. BURG, Chairman

Pam Nelson
PAM NELSON, Commissioner

Laska Schoenfelder
LASKA SCHOENFELDER, Commissioner

STATE OF SOUTH DAKOTA

)

IN CIRCUIT COURT

) ss.

COUNTY OF HUGHES

)

SIXTH JUDICIAL CIRCUIT

THE FILING BY GCC LICENSE)

Civ. 99-235

CORPORATION FOR DESIGNATION A)

AN ELIGIBLE TELECOMMUNICA-)

TIONS CARRIER)

RECEIVED

MAR 27 2000


~~APPELLATE'S PROPOSED FINDINGS~~ SOUTH DAKOTA PUBLIC
OF FACT, CONCLUSIONS OF LAW, AND ORDER UTILITIES COMMISSION

On August 25, 1998, the South Dakota Public Utilities Commission ("Commission") received an Application from GCC License Corporation ("GCC") requesting designation as an eligible telecommunications carrier ("ETC") pursuant to Section 214(e) of the Telecommunications Act of 1996, 47 U.S.C. § 151 et seq. (the "Act") for all the exchanges contained within all of the counties in South Dakota.

On August 26, 1998, the Commission electronically transmitted notice of the filing and the intervention deadline of September 11, 1998, to interested individuals and entities. At its September 23, 1998, meeting, the Commission granted intervention to Dakota Telecommunications Group, Inc. ("DTG"), South Dakota Independent Telephone Coalition ("SDITC"), and U S WEST Communications, Inc. ("US WEST").

The Commission set the hearing for December 17 and 18, 1998, starting at 9:00 A.M., on December 17, 1998, in Room 412, State Capitol, Pierre, South Dakota. The issue at the

hearing was whether GCC should be granted designation as an eligible telecommunications carrier for all the exchanges contained within all of the counties in South Dakota.

Following the submission of post-hearing briefs from the parties, the Commission denied GCC's Application pursuant to Findings of Fact, Conclusions of Law and Order dated May 19, 1999 ("Order").

GCC timely filed its Notice of Appeal on June 3, 1999, seeking review of the Commission's Order. Having considered GCC's Appeal, the Court makes the following Findings of Fact, Conclusions of Law and Order pursuant to SDCL 1-26-36:

FINDINGS OF FACT

1. On August 25, 1998, GCC filed an application requesting designation as an ETC for all of the counties within South Dakota. (Order, p. 1, ¶ 1.) GCC currently provides mobile cellular service in South Dakota under the trade name "Cellular One." (Order, p. 1, ¶ 1.) GCC is a wholly-owned subsidiary of Western Wireless Corporation ("Western Wireless".) (Order, p. 1, ¶ 1.)

2. Pursuant to 47 U.S.C. § 214(e)(2), the Commission is required to designate a common carrier that meets the requirements of Section 214(e)(1) as an ETC for a service area designated by the Commission. (Order, p. 1, ¶ 2.) However, before designating an additional ETC for an area served by a rural telephone company, the Commission must also find that the designation is in the public interest. 47 U.S.C. § 214(e)(2). (Order, p. 2, ¶ 2.) GCC requested designation as an additional ETC throughout the state, which includes areas

served by rural telephone companies and areas served by non-rural telephone companies.

(Order, p. 2, ¶ 2.)

3. Pursuant to 47 U.S.C. § 214(c)(1), a common carrier that is designated as an ETC is eligible to receive universal service support and shall, throughout its service area, offer the services that are supported by federal universal service support mechanisms either using its own facilities or a combination of its own facilities and resale of another carrier's services. The carrier must also advertise the availability of such services and the rates for the services using media of general distribution. (Order, p. 2, ¶ 3.)

4. The undisputed record evidence demonstrates that GCC is a common carrier. (No. 11, p. 6.)

5. The Federal Communications Commission ("FCC") has designated the following services or functionalities as those supported by federal universal service support mechanisms: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multifrequency signaling or its functional equivalent; (4) single party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; (8) access to directory assistance; and (9) toll limitation for qualifying low-income consumers. 47 C.F.R. § 54.101(a). (Order, p. 2, ¶ 4.)

6. As part of its obligations as an ETC, an ETC is required to make available Lifeline and Link-Up services to qualifying low-income consumers. 47 C.F.R. § 54.405; 47 C.F.R. § 54.441. (Order, p. 2, ¶ 5.)

7. GCC currently provides all of the supported services required by the FCC through its existing mobile cellular services. The Commission's Order questioned only GCC's provision of the second supported service, local usage. (Order, p. 3, ¶ 12.) GCC's current mobile cellular packages provide users an amount of local usage, at no extra charge, which can be used to either originate outgoing calls or terminate incoming calls. See 47 C.F.R. § 54.101(a)(2). In addition, GCC presented undisputed testimony that it will provide unlimited local usage as part of a universal service offering once designated as ETC, and will comply with any minimum local usage requirements adopted by the FCC in the future. (No. 10, p. 9; No. 23, p. 56.) GCC thus currently provides local usage as defined by the FCC, and will continue to provide local usage consistent with the FCC's requirements in its universal service offerings.

8. GCC testified that it currently provides mobile cellular service using various types of customer handsets (e.g., small handheld pocket phones, larger briefcase-sized phones, and car phones). GCC also explained it believes that its universal service customers will likely want a wireless local loop service that has certain attributes of traditional landline technology. (No. 11, p. 8; No. 23, p. 115.) For example, GCC explained that customers will likely want dial-tone and the ability to connect answering machines, fax machines, and other peripheral devices, which are features unavailable with a traditional cellular mobile handset. Yet, these features are available using wireless local loop customer premises equipment. (No. 23, pp. 115-16.) GCC also explained that the wireless local loop equipment provides

better signal strength than conventional handsets, so the clarity of calls is enhanced. (No. 10, p. 12.)

9. Based upon the consumer benefits of wireless local loop technology, GCC proposed to provide its universal service offerings using wireless local loop technology and a wireless access unit provided by GCC to customers. (No. 23, p. 115.) A wireless access unit is nothing more than a piece of customer premises equipment that offers features not available with a traditional cellular handset. For example, a wireless access unit has 3 watts of power as opposed to .5 watts typically available with a conventional for a cellular handset. The increased power of a wireless access unit allows for increased signal strength. (No. 23, p. 99.) The wireless access unit also simulates dial-tone, and allows customers to plug in fax machines, answering machines, or other peripheral devices just as they would with landline telephone service. (No. 23, pp. 115-16.) In addition, GCC can optimize signal strength by installing high gain antennas at the customer's residence, if necessary. (No. 23, p. 99.) Unlike a conventional mobile cellular application, where a signal may be subject to fading in and out based upon terrain, a wireless local loop access unit provides a strong, consistent signal. (No. 10, p. 12.)

10. The undisputed record evidence demonstrates that the provision of the supported services is the same whether the customer uses a wireless access unit or a conventional cellular handset. GCC's network infrastructure used to provide the services -- the antennae, cell sites, switch, trunk and radio frequency spectrum -- is the same. (No. 23,

pp. 29, 124-25.) The nature of the services does not change simply because the customer equipment used to transmit and receive the services (i.e., cellular handset vs. wireless access unit) is different. GCC's network infrastructure does not distinguish between calls originated or terminated using a cellular handset or a wireless local loop access unit. (No. 23, p. 29.)

11. GCC is licensed to provide cellular service throughout the State, and has existing signal coverage in 98% of the geography of the State. (No. 10, p. 3; No. 23, p. 30; No. 21.)

12. GCC can offer universal service throughout the State immediately upon designation, and can provide universal service to all who request it.

13. Thus, GCC currently provides the FCC's supported services and demonstrated the intent and ability to provide a universal service offering throughout the state once designated an ETC.

14. The undisputed record evidence demonstrates that GCC can and will comply with the requirements to advertise its universal service offerings as required under 47 U.S.C. § 214(e) and to participate in the federal Lifeline and Link-up programs. (No. 23, p. 10.)

15. Because the Commission did not reach the issue of "public interest in areas served by rural telephone companies," this Court does not reach that issue on this Appeal.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this appeal matter pursuant to SDCL 1-26-30.2.

2. This Court's review of the Commission's Order is governed by SDCL 1-26-36.

On review from an agency's determination, this Court will reverse or modify the agency's decision if the findings, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in light of the entire evidence in the record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

SDCL 1-26-36.

3. This Court will review questions of law on a de novo basis, giving no deference to the Commission's decision. Caldwell v. John Morrell Co., 489 N.W.2d 353, 357 (S.D. 1992). Where an error of law affects a finding of fact, that finding is reviewed de novo as well. In re Balhorn-Moyle Petroleum Co., 315 N.W.2d 481, 483 (S.D. 1982). Mixed questions of fact and law are thus reviewed de novo as questions of law. In re Hendrickson's Health Care Service, 462 N.W.2d 655, 656 (S.D. 1990).

4. Where an appellant challenges a pure finding of fact, it must demonstrate the finding is clearly erroneous in light of the entire evidence in the record. SDCL 1-26-36(5). The Court must set aside the fact finding if, after considering the evidence as a whole, the Court is convinced a mistake has been made. Sopko v. C&R Transfer Co., 575 N.W.2d 225 (S.D. 1998). If this Court does not affirm the Commission's findings and conclusions, it

must enter its own findings and conclusions and remand for further proceedings, if required. SDCL 1-26-36; Schroeder v. Department of Soc. Servs., 529 N.W.2d 589, 592 (S.D. 1995).

5. Any Finding of Fact made above which is more appropriately a Conclusion of Law shall be considered a Conclusion of Law.

6. Pursuant to 47 U.S.C. § 214(e)(2), the Commission is required to designate a common carrier that meets the requirements of Section 214(e)(1) as an ETC for a service area designated by the Commission. However, before designating an additional ETC for an area served by a rural telephone company, the Commission must find that the designation is in the public interest. 47 U.S.C. § 214(e)(2). (Order, p. 6, ¶ 2.)

7. Pursuant to 47 U.S.C. § 214(e)(1), a common carrier that is designated as an ETC is eligible to receive universal service support and shall, throughout its service area, offer the services that are supported by federal universal service support mechanisms either using its own facilities or a combination of its own facilities and resale of another carrier's services. The carrier must also advertise the availability of such services and the rates for the services using media of general distribution. (Order, p. 6, ¶ 3.)

8. The FCC has designated the following services or functionalities as those supported by federal universal service support mechanisms: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equivalent; (4) single party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; (8)

access to directory assistance; and (9) toll limitation for qualifying low-income consumers.

47 C.F.R. § 54.101(a). (Order, p. 6, ¶ 4.)

9. As part of its obligations, an ETC is required to make available Lifeline and Link-Up services to qualifying low-income consumers. 47 C.F.R. § 54.405; 47 C.F.R. § 54.411. (Order, p. 6, ¶ 5.)

10. Section 214(e)(1)-(2) requires the Commission to determine whether an applicant is capable of meeting its obligation to offer and advertise a universal service offering throughout its requested designated service area once designated an ETC. The Commission erred as a matter of law by determining that an applicant for ETC designation must first be providing a universal service offering to every location in the requested designated service area prior to being designated an ETC.

11. Because the Commission erroneously applied the law, this Court must determine de novo based on the record evidence whether GCC meets the proper legal standard. As is set forth in the above Findings of Fact, GCC has demonstrated an intent and ability to offer and advertise a universal service offering throughout its requested designated service areas once designated an ETC in accordance with the requirements of 47 U.S.C. § 214(e) and the FCC's rules and orders.

12. It would be unfair and discriminatory to require an ETC applicant to serve every location in a requested designated service area as a prerequisite to ETC designation. Incumbent local exchange carriers, who are also ETCs, are continually building new

facilities to respond to requests to extend service to unserved consumers. (No. 23, p. 165.)

GCC meets the service area requirement because its license and coverage area support its commitments to offer universal service throughout the State and to provide universal service to all who request it.

13. For areas served by non-rural telephone companies, GCC meets all applicable criteria for ETC designation and is entitled to be designated an ETC under 47 U.S.C. § 214(e).

14. For areas served by rural telephone companies, GCC meets all applicable criteria for ETC designation except the public interest factor, which was not reached by the Commission and not addressed herein. GCC is entitled to be designated an ETC in these areas served by rural telephone companies so long as the Commission determines that designation is in the public interest under 47 U.S.C. § 214(e)(2).

ORDER

1. The Commission's Findings of Fact, Conclusions of Law, and Order dated May 19, 1999, are replaced by this Court's Findings of Fact, Conclusions of Law, and Order, which shall be entered as provided by SDCL 1-26-36. .

2. This matter is remanded to the Commission for further proceedings as follows:

(a) The Commission shall enter an Order designating GCC an ETC in each South Dakota exchange served by a non-rural telephone company; and

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing Notice of Entry of Findings of Fact, Conclusions of Law, and Order was mailed to the following at their respective addresses of record:

Mr. Cameron Hoseck
Executive Director
Public Utilities Commission
State of South Dakota
500 East Capitol
Pierre, SD 57501

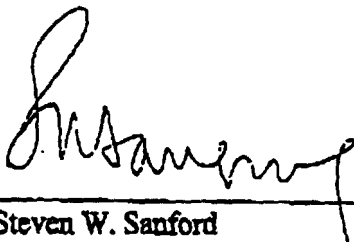
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by U.S. mail, postage prepaid, on March 24, 2000.


Steven W. Sanford

- (b) The Commission shall, based on the record, determine whether designation of GCC as an additional ETC in areas served by rural telephone companies is in the public interest as contemplated by 47 U.S.C. § 214(e)(2).
- (c) The Commission shall designate GCC an ETC in each rural telephone company study area where the additional designation is in the public interest.

Dated: 3-22-2000

[Signature]
JUDGE OF CIRCUIT COURT

*This document supersedes
the Findings, Conclusions &
Order dated 3-20-2000*
[Signature]

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.
FILED

MAR 22 2000

Mary J. Erickson CLERK
[Signature] Deputy